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38/1965

No.13 of 1964

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
- 9 FEB 1966
25 R...
LONDON, W.C.1.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

80977

BETWEEN :-

NATIONAL AND GRINDLAYS BANK LIMITED
(2nd Defendant) Appellant

- and -

10 KENTILES LIMITED (in liquidation) and
THE OFFICIAL RECEIVER (as Liquidator
thereof) (Plaintiffs) Respondents

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from an Order of the Court of Appeal for Eastern Africa at Nairobi (The Honourable Sir Trevor Gould Acting President, and Mr. Justice Newbold Judge of Appeal, Mr. Justice Crawshaw Acting Vice-President dissenting) dated the 29th August 1963. By that Order the Court of Appeal varied a Decree dated the 30th October 1961 of the Honourable Mr. Justice Miles dismissing both the suit brought by the Respondents in the Supreme Court of Kenya against one Hubert Richard Brice and the Appellant (hereinafter called "the Bank"), and the Bank's counterclaim in such suit by declaring that the Bank is not a secured creditor in the liquidation of the Respondent Company in relation to the immovable property the subject of the suit and is not entitled to possession thereof and by making consequential orders including orders as to costs.

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RECORD

2. The issue in this Appeal is whether the Bank is a secured creditor of the Respondent Company either as a legal mortgagee of certain land or as having an equitable charge thereon or as one who has a right to call upon the Respondent Company to perfect an equitable mortgage thereof. All the primary facts and the majority of the inferences to be drawn from those facts have at all times been agreed between the parties and the issue turns upon a number of questions of law. The references in this Case to the Laws of Kenya are to the 1948 Edition of those laws. 10

p.51

p.300

3. In the circumstances it is proposed to summarise these facts (in paragraphs 4 - 18 below) before turning to the issues of law. The facts are taken from the judgment of Mr. Justice Miles, from a statement dated the 19th September 1961 of James Angus Mackie-Robertson, a partner in the firm of Kaplan & Stratton Advocates of Nairobi, which by consent was admitted as evidence at the hearing, and from the record of the proceedings. 20

4. The land, the subject matter of these proceedings (hereinafter and in the judgments referred to as "the suit property"), is a piece of land known as L.R.57 Kasarini less that part thereof known as L.R. 57/16 Kasarini. The suit property is situated in "the Highlands" of Kenya which are described in the Seventh Schedule to the Crown Lands Ordinance (Chapter 155 of the Laws of Kenya) and is land registered under Part XII of that Ordinance. It comprised a brick and tile works. 30

5. In September 1951 the suit property was owned by a company called Kenboard Ltd. and was then together with other property subject to a mortgage by that company in favour of Barclays Overseas Development Corporation Ltd. (hereinafter called "the Barclays Corporation").

6. Early in September 1951 the persons concerned decided to reconstruct the group of companies which included Kenboard Ltd. and instructed Messrs. Kaplan & Stratton to form the Respondent company "to purchase or otherwise acquire all the undertaking, freehold and leasehold, premises, goodwill, plant machinery and stock in trade of or connected with the business of brick and tile manufacturers now carried on by Kenboard Limited" for the purpose of such reconstruction. The Respondent Company was accordingly incorporated on 40

18th September 1951 under the Companies Ordinance (Chapter 288 of the Laws of Kenya) and a certificate that it was entitled to commence business was issued under section 95(3) thereof on 27th September 1951.

10 7. The Bank is a company incorporated in England under the Companies Act 1862 and carries on business in Kenya and many other parts of the world. In 1957 its name was "The National Bank of India Ltd." It subsequently changed its name to "National Overseas and Grindlays Bank Limited" and its present name is "National and Grindlays Bank Limited." The Bank, being a company incorporated outside Kenya which had a place of business in Kenya, had duly delivered the documents and particulars required by section 327 of the Companies Ordinance to be delivered to the Registrar for registration.

8. The reconstruction hereinbefore mentioned involved:-

20 (a) the agreement by the Bank to allow credit to the Respondent Company in an amount not exceeding £90,000 on the security of a debenture charging the property of the Respondent Company with payment of all sums owing by it to the Bank and of a legal mortgage of certain property which included the suit property.

30 (b) the discharge by the Respondent Company of all the liabilities of Kenboard Ltd. out of moneys provided by the Bank, including the liability secured by the said mortgage in favour of the Barclays Corporation.

(c) the transfer from Kenboard Ltd. to the Respondent Company of the former's brick and tile undertaking including the suit property.

40 9. On 1st October 1951 the Respondent Company as a step in the said reconstruction issued a debenture (hereinafter called "the Debenture") to the Bank which was registered in the Companies Register under Section 79 of the Companies Ordinance (Registration of Charges) on 4th October 1951.

p.255

10. By the Debenture the Respondent Company undertook that it would on demand by the Bank pay to the Bank the balance which on account current

RECORD

with the Bank should be for the time being owing not exceeding in the whole £90,000 and interest as therein mentioned and the Debenture provided (inter alia) as follows:-

"(1) The Company hereby charges with the payment and discharge of all moneys and liabilities intended to be hereby secured.... ALL its undertaking, goodwill, assets and property whatsoever and wheresoever both present and future.....

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(2) The charge created by this Debenture, shall rank as a first charge on all the property hereby charged and as regards all immovable property of the Company (to be mortgaged as hereinafter provided) shall constitute a fixed charge and as regards all other property hereby charged shall constitute a floating security.... The Company shall forthwith upon the execution of this Debenture deposit with the Bank the title deeds of all immovable properties now vested in the Company and shall from time to time likewise deposit with the Bank the title deeds of any immovable property which may hereafter be acquired by the Company (all such deposits of title deeds being by way of equitable mortgage as collateral security for the repayment of the principal moneys and interest hereby secured) and shall at its own expense whenever called upon by the Bank so to do execute legal mortgages or charges as the case may require in favour of the Bank over any such immovable properties.

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.....

(6) The principal moneys and interest hereby secured shall immediately become payable without demand:-

(a)

(b) if an order is made or an effective resolution is passed for the winding up of the Company; or

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(c) if the Company without the consent of the Bank ceases to carry on its business or threatens to cease to carry on the same;

(7) At any time after the principal moneys hereby secured become payable either as a result of lawful demand being made by the Bank or under the provisions of Clause 6 hereof the

Bank may appoint..... a receiver and manager of the property hereby charged or any part thereof....

.....

10 (12) After the security hereby constituted has become enforceable the Company shall from time to time and at all times execute and do all such assurances, acts and things as the Bank may reasonably require for facilitating the realisation of the assets and for exercising all the powers, authorities and discretions hereby conferred on the Bank".

11. As hereinbefore mentioned the suit property had prior to September 1951 been mortgaged to the Barclays Corporation. On or about the 2nd September 1951 Barclay's Bank (D.C.& O.) Ltd. (hereinafter called "Barclay's Bank") delivered the title deeds of the suit property to Messrs. Kaplan & Stratton, who thenceforth held them to the order of the Barclays Corporation or Barclay's Bank. On or about the 5th October 1951 Mr. Mackie-Robertson a partner in Messrs. Kaplan & Stratton, who had as a further step in the said reconstruction been instructed by the Respondent Company to have the title to the suit property released from the then encumbrance in favour of the Barclays Corporation, obtained in pursuance of such instructions a letter from the Bank guaranteeing payment of the amount due from Kenboard Ltd. to the Barclays Corporation on the condition and understanding that the letter would release the title deeds from the lien of the Barclays Corporation and immediately render them subject to a lien in favour of the Bank. That letter was passed to the Barclays Corporation or Barclays Bank on or about the 5th October 1951 and thereafter Mr. Mackie-Robertson regarded himself as holding the title deeds to the order of the Bank in pursuance of an arrangement which had been come to between the Respondent Company and the Bank. The title deeds were in the view of Mr. Mackie-Robertson never held by his firm to the order of Kenboard Ltd. or of the Respondent Company but, as was alleged in the Counterclaim and not denied in the Defence thereto, the Respondent Company on or about the 19th December 1951 caused the title deeds to be delivered to the Bank. Such deeds have since then remained in the possession of the Bank.

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- p.265 12. Application for consent by the Governor under Section 88 of the Crown Lands Ordinance (Chapter 155 of the Laws of Kenya) are in practice made to the Land Control Board as are applications for consent under Section 7 of the Land Control Ordinance (Chapter 150 of the Laws of Kenya) as substituted by Section 2 of the Land Control (Amendment) Ordinance 1949 (No. 38 of 1949) and on 20th October 1951 Messrs. Kaplan & Stratton, acting on behalf of the Respondent Company, made written application to the Land Control Board for consent to the proposed mortgage of property which included the suit property by the Respondent Company to the Bank. By a letter dated 31st October 1951 the Secretary of the Land Control Board mistakenly informed Messrs. Kaplan & Stratton that it was not necessary to obtain consent to the transaction. 10
- p.270
- p.271 13. The suit property and the other property the subject of the said mortgage to the Barclays Corporation was by a reconveyance dated the 1st October 1951 reconveyed to Kenboard Ltd. which thereupon conveyed all such property to the Respondent Company by a conveyance dated the 1st November 1951 and the Respondent Company by a mortgage of the same date (hereinafter called "the legal Mortgage") conveyed all such property to the Bank for an estate in fee simple subject to the proviso for redemption therein contained as collateral security for all moneys secured by the Debenture and on 19th November 1951 the said reconveyance, the said conveyance and the legal Mortgage were in that order registered in the Crown Lands Registry, maintained pursuant to the Crown Lands Ordinance (Chapter 155 of the Laws of Kenya) in accordance with Section 126 of that Ordinance. 20
- p.274
- p.244 30
14. On 5th February 1952 the legal Mortgage was registered in the Companies Register under Section 79 of the Companies Ordinance, an extension of time having been duly obtained. 40
- p.277 15. On 17th November 1956 the Directors of the Respondent Company resolved that an application be made to the Court for the winding up of the Respondent Company and on 19th November 1956 the Company presented a petition to the Supreme Court of Kenya at Nairobi for its winding up by the Court.
- p.278 16. By an appointment in writing dated the 20th November 1956 the Bank, acting under the power in 50

that behalf conferred by the Debenture, appointed Mr. Hubert Richard Brice, a partner in the firm of Brice & Gill, Accountants of Nairobi, as receiver and manager of the Respondent Company's property and on 22nd November 1956 Mr. Brice took possession of that property which then included the suit property. p.303

10 17. On 14th December 1956 the Court appointed the Official Receiver provisional Liquidator with powers restricted to taking possession of the reversion of the Respondent Company's property in the hands of Mr. Brice and on 11th January 1957 a winding up order was made by the Court. By such order the Official Receiver was continued as provisional Liquidator and he is now the Liquidator of the Respondent Company. p.280

20 18. By a letter dated 28th October 1957 the Official Receiver suggested to the Bank that in the light of the provisions of section 328 of the Companies Ordinance and the fact that the Bank was incorporated outside Kenya it had no title to deal with the suit property, and after discussions between the parties, he served formal notice dated 22nd April 1958 on the Bank and on Mr. Brice requiring them to vacate the suit property and to give up possession of all movable assets thereon and claimed damages for trespass. No step was taken either by the Bank or Mr. Brice in response to this notice and on 30 7th May 1958 the present proceedings were begun. p.282
p.284
p.1

40 19. The action was begun in the Supreme Court of Kenya, the Respondents being the Plaintiffs and Mr. Brice and the Bank the First and Second Defendants respectively. The Plaintiffs claimed an injunction to restrain the Defendants from entering on the suit property, a declaration that the Respondent Company was the free and unincumbered owner of the suit property, possession of the suit property, damages and ancillary relief.

20. Shortly after the service of the Plaint, the Kenya Legislature enacted the Banks Titles to Land (Amendment of Laws) Ordinance 1958 (No. 36 of 1958). This Ordinance amended, inter alia, section 328 of the Companies Ordinance in the manner hereinafter set out in paragraph 40 of this case, but provided that nothing therein contained should affect any action, suit or proceedings commenced before 13th May 1958.

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21. The Bank delivered a Defence on 4th June 1958, and on 16th March 1959 amended its Defence and added a counterclaim thereto. A further amendment was effected on 18th September 1961, the first day of the hearing before Mr. Justice Miles. In its final form the pleading counter-claimed, inter alia,:

(a) A declaration that the Bank was the legal mortgagee of the suit property;

(b) A declaration that the Bank was entitled to require the Respondents or one of them to deliver to it duly executed an appropriate memorandum of deposit of the title deeds of the suit property by way of equitable mortgage. 10

(c) An order that the Second Respondent be directed forthwith at his own expense or that of the Respondent Company to complete and execute and deliver to the Bank such a memorandum as aforesaid. 20

In its amended defence and counterclaim the Bank accepted the view that possession of the suit property by the Receiver constituted possession thereof by the Bank.

22. Mr. Brice also delivered a Defence but as, for reasons which are explained hereafter, he is not a party to this Appeal, the terms of that defence are not material. He made no counterclaim.

23. At the hearing before Mr. Justice Miles the Bank's defences to the Respondents' claim and the Respondents' replies to those defences were as follows:- 30

A. Legal Mortgage

(i) The Bank contended that it was by virtue of the legal Mortgage (which as stated above had been duly registered under Section 126 of the Crown Lands Ordinance) the legal mortgagee of the suit property and that accordingly the Respondent Company was not the free and unincumbered owner thereof. 40

(ii) The Respondents replied that:-

(a) By the terms of Section 328 of the Companies Ordinance as it existed when

the action was begun, the Bank was debarred from holding a legal estate in land situated, as was the suit property, in the "Highlands".

(b) The mortgage, if otherwise valid, had been avoided by the failure of the Bank to obtain the consents required by Section 7 of the Land Control Ordinance and Section 88 of the Crown Lands Ordinance in the case of land in the "Highlands".

10 (iii) The Bank contended that on its true construction the Companies Ordinance did not have the effect for which the Respondents contended and that on the true construction of the Land Control and Crown Lands Ordinance no consent was required.

B. The Debenture

20 (i) The Bank contended that it could rely upon the Debenture as creating a charge and further or alternatively as entitling it to appoint a receiver of the property of the Respondents.

30 (ii) The Respondents replied that the Debenture in so far as it created a charge on land in the "Highlands" was avoided by the failure of the Bank to obtain consents thereto under Section 7 of the Land Control Ordinance and Section 88 of the Crown Lands Ordinance and that in so far as it created a charge on land registered under Part XII of the Crown Lands Ordinance it was void (Section 126) or alternatively inadmissible in evidence (Section 127) as not having been registered under Section 126.

(iii) The Bank contended that Section 7 of the Land Control and Sections 88 and 126 of the Crown Lands Ordinance had no application to a debenture such as the Debenture which created a charge over subsequently acquired land.

40 (iv) The Bank further contended that even if Section 127 of the Crown Lands Ordinance applied to the Debenture it did not render it wholly inadmissible, but only inadmissible as evidence of a lien, mortgage or charge of or upon land and that

accordingly it could be tendered in evidence to establish a contract entitling the Bank to appoint a receiver, just as it was admissible, as was conceded by the Respondents, as evidence of a charge on movables.

C. Equitable Mortgage by Deposit

(i) The Bank conceded that the effect of section 127 of the Crown Lands Ordinance was to prevent it giving evidence of an equitable mortgage by deposit of title deeds, since no statutory memorandum of such a transaction had been registered. The Bank said that this omission was attributable to the failure by the Respondents to furnish it with such a memorandum and that the Respondents were under an obligation to execute and deliver such a memorandum to the Bank. It contended that in the light of its counterclaim for the execution and delivery of such a memorandum by the Respondents, the Court in the exercise of its equitable jurisdiction and in order to prevent the Respondents taking advantage of their own wrong should refuse to grant the Respondents any of the relief sought. 10
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(ii) The Respondents replied that:-

(a) The Bank was debarred from holding an equitable interest in land situated in the "Highlands" and so from taking an equitable mortgage by deposit of such land by the proviso of Section 328 of the Companies Ordinance. 30

(b) The Debenture is an essential part of the Bank's evidence in seeking to prove an equitable mortgage by the deposit of title deeds or an agreement to create such a mortgage and that not having been registered under Section 126 of the Crown Lands Ordinance, it was rendered inadmissible by Section 127 of that Ordinance. Further the Debenture did not fall within the exception contained in Section 129(c) in respect of a "document not in itself creating, declaring, assigning, limiting or extinguishing any right, title or interest in land, but merely creating a 40

right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest" in that it did itself create an equitable charge.

10 (c) On a true view of the facts the Respondent Company did not deposit the title deeds of the suit property with intent to create an equitable mortgage but in consequence of the execution of the legal Mortgage.

(iii) The Bank joined issue on the Respondents' contentions as set out above.

24. At the hearing before Mr. Justice Miles the Bank's contentions in support of its counterclaim and the Respondents' replies thereto were as follows:-

20 A. Legal Mortgage

(i) The Bank claimed a declaration that it was the legal mortgagee of the suit property.

(ii) The Respondents denied that the Bank was the legal mortgagee thereof and the contentions of the parties were as summarised at A in paragraph 23 of this case.

30 (iii) The Bank further contended that its counterclaim was not an action, suit or proceeding commenced before 13th May 1958 and that accordingly Section 328 of the Companies Ordinance applied in the amended form provided for by the Banks Titles to Land (Amendment of Laws) Ordinance, 1958 (No. 36 of 1958), under which, as was conceded, the Bank was entitled to hold a legal estate in land situated in the "Highlands".

40 (iv) The Respondents replied that on the true construction of the 1958 Ordinance, the counterclaim was an action, suit or proceeding commenced before 13th May 1958 or was so interconnected with the Plaintiffs' claim, which admittedly was such an action, that Section 328 of the

Companies Ordinance in its amended form had no application. Alternatively the Respondents contended that the principle of estoppel per rem judicatam would prevent the Bank succeeding on this aspect of its counterclaim if the Court held on the claim that it was not the legal mortgagee of the suit property.

B. Equitable Mortgage by Deposit

The contentions of the parties in relation to the Bank's claim to relief on the basis that it was entitled to require the Respondents or one of them to execute and deliver a statutory form of memorandum of the deposit of the title deeds of the suit property by way of equitable mortgage were as set out in C in paragraph 23 of this Case. In addition, on the supposition that the Respondents were right in their contention that Section 328 of the Companies Ordinance in its unamended form prevented the Bank from holding an equitable interest in land situate in the "Highlands" and so from taking an equitable mortgage of such land, the parties advanced their respective contentions in relation to the effect of the Banks Title to Land (Amendment of Laws) Ordinance, 1958, (see A (iii) and (iv) of this paragraph). 10 20

25. It will be more convenient to refer to the reasons for Mr. Justice Miles' decision when setting out the reasons adopted by the members of the Court of Appeal (see paragraphs 34 to 64 below). At this stage it may be sufficient to say that he held that:- 30

(i) The Respondents' claim should be dismissed with costs because although:-

(a) the Bank by virtue of Section 328 of the Companies Ordinance had no power to hold a legal estate in the "Highlands", 40

(b) the legal Mortgage was in any event void for lack of the consents required by Section 7 of the Land Control Ordinance and Section 88 of the Crown Lands Ordinance, and

(c) the Bank's defence based upon its alleged entitlement to have an equitable

mortgage perfected by the execution of a memorandum of deposit which might otherwise have succeeded could not do so since there were no facts which showed or from which it could be inferred that the title deeds had been deposited with intent to create an equitable mortgage,

10 the Debenture nevertheless created an enforceable charge on the suit property and the Bank was accordingly entitled to rely upon the Debenture as giving it a right to appoint Mr. Brice as Receiver thereof.

(ii) The Bank's counterclaim should be dismissed with costs because:-

20 (a) In relation to its claim to be a legal mortgagee, although the Bank could in its counterclaim rely upon Section 328 of the Companies Ordinance in its amended form, this did not surmount the objection that the necessary consents had not been obtained under the Land Control and Crown Lands Ordinances.

(b) In relation to its claim to be entitled to have an equitable mortgage perfected it could not establish any deposit of title deeds with intent to create an equitable mortgage.

30 26. The Bank appealed against the dismissal of the counterclaim, the grounds for such appeal being set out in its Memorandum of Appeal filed on 17th March 1962. The First Defendant, who had not been a party to the counterclaim and who had succeeded in his defence, had no cause to appeal and did not do so. The Respondents filed and served on the Bank, but not on the First Defendant, a document headed "Notice of Cross Appeal" in which they contended that the decision of Mr. Justice Miles on their claim should be "varied" by setting aside so much thereof as ordered that the claim be dismissed with costs and by entering judgment for them on the claim and that the remainder, whereby the learned Judge dismissed the counterclaim, be affirmed on grounds other than those relied upon by him.

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p.89

40 27. The adoption of this procedure gave rise to a preliminary objection by the Bank which applied

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for an order that paragraphs 1 to 3 and 5(c) of the Respondents' Notice of Cross Appeal be struck out. This preliminary objection was determined by the Court of Appeal immediately before the hearing of the appeal itself. In support of its application the Bank contended that:-

(i) The Bank's appeal related only to its counterclaim and if the Respondents wished to appeal in respect of their claim they were obliged by Rule 54 of The Eastern African Court of Appeal Rules 1954 to file a separate notice of appeal and to serve it upon the First Defendant (the Receiver, Mr. Brice) as being a person affected by the appeal, as well as upon the Bank and (by Rule 58) to give security for the costs of their appeal, and that the Bank would have been entitled to apply under Rule 60 for security for costs, and the First Defendant could have taken such part in the appeal as he was advised. 10 20

(ii) the Respondents having claimed against two Defendants jointly and upon identical grounds, both factual and legal, it was not open to them to appeal against the dismissal of their claim against one (the Bank) whilst accepting its dismissal against the other (the Receiver, Mr. Brice) thus inviting the Court to give two inconsistent judgments in the same action.

p.105, 1.31
p.137, 1.4

28. On 18th June 1963 the Hon. Sir Trevor Gould, Acting President, with the agreement of Mr. Justice Crawshaw ruled as follows:- 30

"I am of opinion that so far as paragraphs 1, 2 and 3 of the notice of cross appeal are concerned, they should have been the subject of a separate appeal which could have been heard together with the present one. Having regard to the close relation between all the matters in question I think it right to order that the notice of cross appeal may, as to those paragraphs, be treated as a separate appeal against the decision on the claim in the plaint and that the existing record be treated as the record of the new appeal with such additions as may be agreed or allowed. 40

I would have been disposed to make some order for security for costs had this application been brought at an earlier date but consider it is now too late and therefore would make no order".

The learned Judge then ordered that the costs of the Bank in relation to the preliminary objection should be taxed and paid by the Respondents in any event.

10 29. Mr. Justice Newbold dissented from the ruling set out above. In his opinion the Respondents were entitled under the rules to adopt the course which they did but that it was "a very good objection indeed" that the cross appeal related only to the Bank and "leaves in the air the position as regards the First Defendant". The learned Judge went on to say that the Court could not permit a situation to arise "whereby judgment in the same action would, for the two Defendants and the same Plaintiff, have precisely the opposite effect". He would have made an order directing that the First Defendant be made a party to the appeal on terms that he should in no circumstances be liable for the costs of the appeal and that no order as to damages or mesne profits would be made against him.

p.177

30 30. It is respectfully submitted that all the learned Judges of the Court of Appeal erred in treating a notice of cross-appeal by a Respondent as being the same as or including a cross-notice of appeal whereas, on the true construction of the East African Court of Appeal Rules, such a notice is equivalent to a Respondent's notice under Order 58 rule 6 of the English Rules of the Supreme Court. Neither the said Rules nor the practice and procedure for the time being of the Court of Appeal in England (to which Rule 52 requires resort to be had in respect of matters not otherwise provided for) permitted the Court of Appeal to hear and determine the Respondents' appeal. Accordingly the hearing of that appeal and so much of the Final Order of the Court of Appeal as purported to allow that appeal, namely paragraphs (2) and (4) thereof, were ultra vires the Court and should be set aside.

p.233

40 31. Alternatively the Bank will submit that for the reasons given by Mr. Justice Newbold the Court of Appeal should not have permitted the Respondents to appeal save on the terms proposed by the learned Judge. No such terms were imposed and accordingly the said paragraphs of the Final Order of the Court of Appeal should be set aside.

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32. On the hearing of the substantive part of the appeal on 18th and 19th June 1963 the contentions of the parties were, in all material respects, the same as at the hearing before Mr. Justice Miles and have been summarised in paragraphs 23 and 24 of this Case. Judgment was given on 29th August 1963 the order of the Court of Appeal in relation to this part of the appeal being that:-

(i) The Bank's appeal against the dismissal of its counterclaim be dismissed with costs. 10

(ii) The decree of the Supreme Court in relation to the Respondents' claim be varied to provide that

(a) the Respondents' claim against the First Defendant (the Receiver, Mr. Brice) was dismissed with costs.

(b) the Respondents' recover from the Bank one half of the costs payable by them to the First Defendant.

(c) the Bank was declared not to be a secured creditor in the liquidation of the Respondent Company in relation to the suit property either by way of legal or equitable mortgage or charge and not to be entitled to possession of such property. 20

(d) the Respondents were to be at liberty to apply to the Supreme Court within fourteen days of 29th August 1963 for such order directing the Bank to terminate the appointment of the First Defendant as Receiver in relation to the suit property as was necessary to give full effect to the declaration at (c) above. 30

(iii) The Bank should pay one quarter of the Respondents' costs of their appeal.

33. The reasons for the judgments of Mr. Justice Miles and the learned Judges of the Court of Appeal are best appreciated if assembled comparatively under the following heads :-

<u>Subject</u>	<u>Paragraphs of Case</u>	40
<u>Legal Mortgage</u>		
Effect of Section 328 of the Companies Ordinance in relation to the Claim	34 to 39	

	<u>Subject</u>	<u>Paragraphs of Case</u>
	<u>Legal Mortgage (Contd.)</u>	
	Effect of Section 328 of the Companies Ordinance in relation to the Counterclaim	40 to 43
	Effect of Section 7 of the Land Control Ordinance and Section 88 of the Crown Lands Ordinance	44 to 46
10	<u>Equitable Mortgage by Deposit</u>	
	In relation to the Counterclaim	47 to 56
	In relation to the claim	58 and 59
	<u>The Debenture</u>	
	As a defence to the claim for possession	60 to 64
	34. <u>Legal Mortgage - Effect of Section 328 of the Companies Ordinance in relation to the Claim</u>	
20	At the time when the claim was filed, Section 328 of the Companies Ordinance (cap, 288) was in the following terms:-	
	"328. A company incorporated outside the Colony which has delivered to the registrar the documents and particulars specified in paragraphs (a), (b), (c) and (d) of the last foregoing section shall have the same power to hold lands in the Colony as if it were a company incorporated under this Ordinance.	
30	Provided that no company incorporated outside the Colony shall have power to acquire land situate in the Highlands (as described in the Seventh Schedule to the Crown Lands Ordinance) unless such company is registered in accordance with this Ordinance".	
	35. <u>The trial Judge and the Judges of the Court of Appeal</u> all held that the Bank was debarred from holding a legal estate in land situate in the Highlands by the terms of the proviso to Section 328 and indicated that they thought that the exception to the proviso	p.59, 1.20 to p.62, 1.16 p.187, 1.42 p.214, 1.6 p.227, 1.27
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in favour of companies registered in accordance with the Ordinance applied only to companies registered under Part XI of the Ordinance. It is respectfully submitted that the learned Judges erred in their construction of the section.

36. The Scheme of the Kenya Companies Ordinance (Cap.288) is derived from the United Kingdom Companies Act, 1929 and is as follows:-

Part II of the Companies Ordinance makes provision for the incorporation of new companies 10 and by section 15 confers power to hold land. Such companies might be described as "Kenyan by birth". Part X of the Ordinance is concerned with companies formed under repealed laws and such companies can also be regarded as "Kenyan by birth", albeit of a different generation. Part XI of the Ordinance which corresponds to Part IX of the United Kingdom Companies Act 1929 authorises companies not formed under the Ordinance to register thereunder and upon such 20 registration they become under Section 312 Companies incorporated under the Ordinance. Part XIII of the Ordinance is concerned with companies incorporated outside Kenya which are carrying on business within Kenya. Such companies are required by Section 327 to deliver certain particulars to the registrar for registration and to do so within one month of establishing a place of business within Kenya. These companies may be described as "registered 30 aliens".

37. In the absence of a provision to the contrary a limited company would at the date of the commencement of the Companies Act 1929 have been precluded from holding land in England by Section 1 of the Mortmain and Charitable Uses Act, 1888 and accordingly the Companies Act, 1929, conferred express authority to hold land in the United Kingdom without licence in mortmain on companies which were (a) "English by birth" (Part I - 40 Section 14) or (b) "registered aliens" (Part XI - Section 345). The wording of Section 328 of the Kenya Companies Ordinance which is in part XIII thereof is derived from Section 345 of the Companies Act 1929 and, like that section, is apt to confer power to hold land if such power either had not been conferred upon a company by its law of incorporation or, if so conferred, had been restricted by another provision. The section is, it is submitted, an enabling and not a prohibitive 50

section. So far as the Bank is concerned, it has no need to resort to the section since it is empowered to hold land by its law of incorporation and this power was not restricted by the Mortmain and Charitable Uses Act, 1888, which did not apply to Kenya, or by any Kenyan legislative provision.

10 38. Alternatively, it is submitted that the section on its true construction must be intended to enable Part XIII ("registered alien") companies to hold land in the Highlands and cannot be intended to apply to companies registered under Part XI as the learned judges have suggested since the part of the Companies Act 1929 corresponding to Part XI did not permit the registration under the United Kingdom Act of a company incorporated outside the United Kingdom. See Bulkeley v. Schutz L.R. 3 PC 764. Even if a company
20 incorporated outside Kenya could be registered under Part XI it would on such registration become, by section 312, a company incorporated under the Kenya Ordinance and Part XIII including Section 328 would be wholly inapplicable thereto. Accordingly if a foreign company whose particulars have been registered under Section 327, as has been done in the case of the Bank, is not a company "registered in accordance with the provisions of this Ordinance," the exception to the proviso can never have any operation.

30 39. Accordingly it is respectfully submitted that section 328 of the Companies Ordinance does not debar the Bank from holding or alternatively enables it to hold land situate in the Highlands and provides no answer to its claim to be a legal mortgagee of the suit property.

40. Legal Mortgage - Effect of Section 328 of the Companies Ordinance in relation to the Counterclaim

40 Section 2 of the Banks Title to Land (Amendment of Laws) Ordinance 1958 (No.36 of 1958) added the following words to Section 328 of the Companies Ordinance:-

"or is one of the banks or bodies of persons with whom title deeds may be deposited by way of equitable mortgage or charge by reason of paragraph (b) of sub-section (4) of Section 7 of the Land Control Ordinance."

RECORD

It is common ground that the Bank is amongst those referred to in this addition and that if Section 328 of the Companies Ordinance is applicable in its amended form it provides no defence to the Bank's counterclaim for a declaration that it is a legal mortgagee of the suit property. However, Section 1 of the amending Ordinance provided that Section 2 thereof should be deemed to have come into operation on 13th December 1945 "provided that nothing in" Section 2 "shall affect any action, suit or proceedings commenced before 13th May 1958". The claim was begun before and the counterclaim after 13th May 1958.

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p.67, l.39 to
p.68, l.32;
p.188, ll.27-47

41. The view of Mr. Justice Miles was summarised by Mr. Justice Crawshaw in the Court of Appeal as follows:-

"He considered the rules under Order (viii) of the Civil Procedure (Revised) Rules 1948, rule 2 of which says that "a counterclaim shall have the same effect as a cross-suit" (similar to Order 19 rule 3 of the Rules of the Supreme Court in England). He then considered certain English authorities in which it stated when counterclaims could be treated as "independent" actions and said:-

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"It would appear therefore, that the law applicable to the counterclaim is the law after the passing of the Banks (Title to Land) Amendment of Laws Ordinance, 1958. It may seem odd that a Court must apply two different legal tests to the validity of the same instrument on the claim and counterclaim but I see no escape from this conclusion."

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p.192, ll.21-26

Mr. Justice Crawshaw himself expressed no opinion on the point.

p.215, ll.20-33

42. The Hon. Sir Trevor Gould disagreed with the learned trial Judge holding that the intention of the legislature was that the Bank should be unable to avail itself of the benefit of the amendment in any way, (whether by defence, counterclaim, cross-action or subsequent action) which would affect the action brought by the Respondents. In his opinion an action was affected if the judgment given therein was detracted from, negatived or varied in any way. Mr. Justice Newbold agreed with Sir Trevor Gould upon the grounds that it would be nonsense if the law were such that the mortgage was held to be invalid for the purposes

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p.228, ll.3-26

of the claim, but valid for the purposes of the counterclaim. He also considered that the invalidity of the mortgage would be res judicata for the purposes of the counterclaim by reason of the notionally earlier judgment on the claim.

10 43. It is respectfully submitted that the learned trial Judge was right and the majority of the Court of Appeal were wrong. No question of res judicata could arise if different law were applicable to the counterclaim. The counterclaim was not an action, suit or proceeding commenced before 13th May 1958 and judgment on the counterclaim did not affect any such suit. The proviso refers to proceedings and not to rights. Its purpose, it is submitted, was not to protect accrued rights to property but to protect any litigant from a liability in costs arising out of a change in the law during the course of the action. This purpose was fulfilled if the
20 Ordinance was construed as the learned trial Judge construed it.

44. Legal Mortgage - Effect of Section 7 of the Land Control Ordinance and Section 88 of the Crown Lands Ordinance

Section 7 of the Land Control Ordinance (Cap.150) as substituted by Section 2 of the Land Control (Amendment) Ordinance 1949 (No. 38 of 1949) provides, so far as is material, as follows:-

30 "7(1). No person shall, except with the consent in writing of the Board" [i.e. the Land Control Board] "in the exercise of its powers under the provisions of sub-section (1) of Section 8 of this Ordinance -

40 (a) sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of a like nature to the foregoing or not, alienate, encumber, charge or part with the possession of any land", (which in this Section means land in the "Highlands", See Section 2) "or any right, title or interest, whether vested or contingent, in or over any land to any other person;

(b) acquire any right, title or interest in or over any land for or on behalf of any person or of any company registered under the Companies Ordinance.

RECORD

(c)

Section 88 (1) of the Crown Lands Ordinance (Cap.155) provides, so far as is material, as follows:-

"88. (1) No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situate in the Highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor, except with the written consent of the Governor, shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this sub-section without the written consent of the Governor;"

p.64, 1.26 to
p.67, 1.1
p.192, 1.16
p.214, 1.26
p.228, 1.29

45. The Respondent Company attempted to obtain consents under the sections and failed to do so in the circumstances set out in paragraph 12 of this Case. Both the learned trial Judge ("with no little hesitation") and the Court of Appeal held that this failure was fatal to the Bank's defence and to its counterclaim in so far as either was based upon the legal mortgage. The ground of their decision was that there was nothing to exclude the statutory definition of "person" contained in Section 3(1) of the Interpretation and General Provisions Ordinance, 1956, (No. 38 of 1956) which provided that the word "person" in any Ordinance should, unless there was something in the object or context inconsistent with such construction, include "any company or association or body of persons corporate or unincorporate" and that accordingly there was no ground for confining the word "person" in the sections to natural persons. Section 3(1), so far as is material, re-enacts Section 2 of the Interpretation and General Clauses Ordinance (Chapter 1 of the Laws of Kenya).

46. It is respectfully submitted that the learned Judges were in error in so construing the sections

since the object of the legislature was to restrict the occupation of the Highlands by persons of different race, a policy which can be applied to the shareholder of a company but not to the company itself, and because in the context of the use of the word "person" elsewhere in these Ordinances the narrower meaning of the word, namely "a natural person", is to be preferred.

10 47. Equitable Mortgage by Deposit in relation to the Counterclaim

The law of Kenya with regard to equitable mortgages by deposit is governed by Section 2 of the Equitable Mortgages Ordinance (Chapter 152 of the Laws of Kenya) which so far as is relevant to this Appeal provides as follows:-

20 "Subject to the provisions hereinafter contained nothing in Section 59 of the Indian Transfer of Property Act 1882 (Act IV of 1882), as applied to the Colony shall be deemed to render invalid mortgages made in the Colony by delivering to a creditor or his agent of a document or documents of title to immovable property with intent to create a security thereon. Such delivery shall, subject to the provisions of the Crown Lands Ordinance, whether made before or after the date of this Ordinance, have the same effect on the immovable property sought to be charged as a deposit of title deeds in
30 England at the date of this Ordinance" (i.e. the 30th November 1909).

48. Sections 126, 127 and 129 of the Crown Lands Ordinance (Cap.155) are relevant to this part of the appeal and provide, so far as is material, as follows:-

40 "126. All transactions entered into, affecting or conferring or purporting to confer, declare, limit or extinguish any right, title, or interest, whether vested or contingent, to, in or over, land registered under this part" [i.e. Part XII of the Ordinance] "(other than a letting for one year only or for any term not exceeding one year) and all mutations of title by succession or otherwise shall be registered under this part."

"127. No evidence shall be receivable in any Civil Court:-

.....

RECORD

(2) Of a lien, mortgage or charge
of or upon such land unless the mortgage or
charge is created by an instrument in writing,
and the instrument has been registered under
this Part.

.....

Provided, however, that nothing hereinbefore
contained shall apply to an equitable mortgage
by deposit of documents of title provided that a
memorandum of such equitable mortgage shall have
been registered in the register. On the
discharge of such equitable mortgage a memorandum
of such discharge shall be registered in the
register. Every memorandum shall be transmitted
to the registry in duplicate and shall be in such
form and there shall be paid on the registration
thereof such fee as may be prescribed."

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.....

129. [Nothing in Section 127 shall apply to:-]

"(e) any document not itself creating, declaring,
assigning, limiting or extinguishing any right,
title or interest to or in land registered under
this Part, but merely creating a right to obtain
another document which will, when executed, create
declare, assign, limit or extinguish any such
right, title or interest".

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49. The Bank's contention on this part of the case is
and has always been that if it is not a legal mortgagee
of the land it is in the position of one to whom the
Respondent Company has agreed to grant an equitable
mortgage by deposit of title deeds, that the deeds
have been deposited and that, as was held by Mr.
Justice Crawshaw and the Hon. Sir Trevor Gould, it was
an implied term of the Debenture that the Respondent
Company would, on depositing the title deeds of any
property registered under Part XII of the Crown Lands
Ordinance, also deliver an appropriate memorandum of
such deposit in a form which is registrable under the
Crown Lands Ordinance.

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p.209,
11.3-29
p.220, 1.32
to p.221,
1.5

50. The Respondents' first answer to this contention
is that section 328 of the Companies Ordinance debars
the Bank from holding an equitable interest in land in
the Highlands. As to this the learned trial Judge and
Mr. Justice Crawshaw both held that the word "land" in
section 328 of the Land Control Ordinance means a
legal estate in land and that accordingly there was
nothing in that section to prevent the Bank relying

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p.74, 1.45
p.198, 1.22

upon an equitable mortgage. The other members of the Court of Appeal did not find it necessary to express any opinion on this point.

10 51. The Respondents' second answer is that the Bank is unable to prove any agreement to grant an equitable mortgage because the Debenture, which might otherwise evidence such an agreement is rendered inadmissible in evidence for this purpose by section 127 of the Crown Lands Ordinance. On this point Mr. Justice Miles and Mr. Justice Crawshaw held that the Debenture did not itself create an equitable mortgage of any land but contained an agreement to create an equitable mortgage by deposit of any land which the Respondent Company should subsequently acquire and accordingly on the authority of Denning v. Edwards 1961 A.C. 245 was by virtue of Section 129(e) of the Crown Lands Ordinance not inadmissible in evidence for the purpose of proving such agreement even though it was inadmissible to prove a charge on the suit property. Mr. Justice Crawshaw added that the Debenture conferred upon the Bank the right to call for a memorandum of deposit of title deeds of the suit property so as to constitute it the equitable mortgagee thereof. On this point he said:-

p.78, 1.16
p.205, 1.27

30 "Admittedly the Debenture does not make specific provisions for a memorandum, but nor does the Equitable Mortgages Ordinance or Section 88(4)(b) of the Crown Lands Ordinance or Section 7(4)(b) of the Land Control Ordinance. If, on deposit, the intention of the parties could not be proved it is clear that there would be no effective security and the depositor would presumably be able to reclaim the deeds as soon as they had been deposited and he had had the benefit of the loan. This to my mind cannot have been the intention of the parties. The debenture makes it perfectly clear that the intention was that the deposit was to be by way of security, and because of the provisions of Section 127 effective security could only be obtained if the deposit was accompanied by a memorandum, as is quite a normal practice. The fact that many years passed after the deposit and before a memorandum was asked for is, I think, immaterial, especially as both Kentiles and the appellant were under the impression during that period that the legal mortgage of the 1st November, 1951, was valid".

p.209, 1.3

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RECORD

- p.210, 1.1 Having so decided he went on to say that since there was no legal mortgage the fact that the Bank had claimed under the mortgage did not preclude it from asserting its right under the agreement contained in the Debenture.
- p.215, 1.35 52. The Hon. Sir Trevor Gould thought that the counterclaim did not put forward a claim that the delivery of the title deeds or the Debenture constituted an equitable mortgage of the suit property. He then proceeded to consider the question whether the Debenture was admissible in evidence as a contract to give or create an equitable mortgage in the future. After referring to Section 129(e) of the Crown Lands Ordinance the learned Judge held that it was possible to have an agreement to provide an equitable mortgage which fell within that paragraph provided that the agreement itself did not amount to an equitable mortgage and he said:- 10
- p.219, 1.30
- p.220, 1.32 "I think in the present case that Kentiles was bound by the debenture to deposit title deeds to future acquired immovable property with the Bank and to provide a memorandum to enable the deposit to be proved and effective. That deposit was intended to be by way of collateral security with the charge which the debenture would itself have effected over such land on its acquisition, but which could not be given in evidence by reason of Section 127 of the Crown Lands Ordinance." 20 30
- p.221, 1.17 Notwithstanding this view he held that Section 127 prohibited the giving of any evidence that the Bank was an equitable mortgagee and accordingly that there was no admissible evidence that the title deeds of the disputed land were deposited with the Bank with intent to create an equitable mortgage or otherwise took effect as such with the result that the Bank was unable to establish that it was entitled to demand a memorandum of deposit of such title deeds. 40
- p.227, 1.16 53. Mr. Justice Newbold took the view that the Bank's appeal could not succeed unless the Bank was either the legal or equitable mortgagee of the suit property. He failed to express a view on the Bank's claim to relief on the basis that it had the benefit of an agreement to create an

effective equitable mortgage. Having decided, for the reasons hereinbefore set out, that the Bank was not the legal mortgagee thereof, he held that it was unable to prove that it was the equitable mortgagee thereof since the proviso to Section 127 only excluded from the operation of the Section an equitable mortgage by deposit of documents if a memorandum of such equitable mortgage has been registered and in this case no memorandum of deposit had been registered.

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54. Mr. Justice Miles, having accepted all the Bank's submissions with regard to the law in relation to an agreement to create an equitable mortgage, held as a fact that there had been no deposit of title deeds with intent to create a security at the material time. He reached this conclusion because he thought that the parties intended to create a legal mortgage. Mr. Justice Crawshaw did not accept this conclusion as appears from the passage of his judgment set out in paragraph 51 of this case. The other members of the Court of Appeal did not express any view upon this point.

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55. It is respectfully submitted that Mr. Justice Crawshaw was right and Mr. Justice Miles was wrong. The intention of the parties is to be ascertained objectively from what occurred and the contract between the parties contained in the Debenture. The Debenture shows clearly by clause 2 that, as regards subsequently acquired land, the parties intended that the Respondent Company should deposit the title deeds with the Bank by way of equitable mortgage to secure the Bank until such time as the Bank should have called upon the Respondent Company to execute and the Respondent Company should have executed an effective legal mortgage in favour of the Bank. If the Bank is not now the legal mortgagee of the suit property, no such effective legal mortgage was ever executed.

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56. Accordingly it is submitted, as Mr. Justice Crawshaw held in his dissenting judgment in the Court of Appeal, that the Bank is entitled to an order requiring the Respondents, or one of them, to execute and deliver to the Bank a memorandum of the deposit of the title deeds to the suit property by way of equitable mortgage in the form requisite to enable the Bank to register the same under the Crown Lands Ordinance.

57. With regard to the Bank's claim to be an equitable mortgagee by deposit of the suit property it is submitted

(A) That the arrangement referred to in paragraph 11 of this Case resulted in a constructive delivery of the title deeds to the Bank so soon as the letter mentioned in that paragraph had been obtained by Mr. Mackie-Robertson or if this was not so that there was (as alleged in the counterclaim and not denied in the defence thereto) actual delivery thereof to the Bank by the direction of the Respondent Company on the 19th December 1951 and that once it is established that the Respondent Company had agreed to deposit the title deeds of the disputed land with the Bank by way of equitable mortgage the fact that the title deeds were deposited by the Respondent Company with the Bank is referable to this prior agreement and that in the absence of any other explanation it is a necessary inference that they were so deposited by way of equitable mortgage even supposing there is no direct evidence which is admissible that this was the case. 10 20

(B) Alternatively on the assumption that the said title deeds (which are now admittedly held by the Bank) were deposited with the Bank otherwise than by way of equitable mortgage that the Respondent Company is bound by the said agreement to deliver an appropriate memorandum of deposit of such deeds by way of equitable mortgage and that upon such delivery the Bank will become the equitable mortgagee by deposit of the disputed land and entitled, so soon as such memorandum has been registered, to enforce such equitable mortgage. 30

58. Equitable Mortgage by Deposit in relation to the Claim

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The Bank also relied upon its right to delivery of such a memorandum as a defence to the Respondents' claim for possession contending that the Court should not allow the Respondents to take advantage of their own wrong in failing to execute and deliver such a memorandum and should

allow the First Defendant to remain in possession of the suit property pending the execution and delivery of such a memorandum.

59. Mr. Justice Miles did not think it necessary to decide whether this submission was well founded since he held that the Bank was not entitled to delivery of such a memorandum. Mr. Justice Crawshaw held that the Bank's submission was well founded. The other members of the Court of Appeal expressed no views since in the light of their decision on the entitlement of the Bank to delivery of the memorandum the point did not arise.

p.81, 11.30-40
p.212, 11.22-29

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60. The Debenture as a defence to the claim for possession

The Bank sought to rely upon the Debenture as justifying the entry into and occupation of the suit property by the Receiver.

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61. Mr. Justice Miles held that there was nothing in Section 7(1) of the Land Control Ordinance or Section 88(1) or Section 126 of the Crown Lands Ordinance which rendered an instrument creating a charge over land subsequently acquired by the chargor subject to the provisions of those sections and accordingly that the defence to the Respondents claim afforded by the Debenture was not invalidated by any of those sections. Dealing with this question he said:

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"Now, at the date of the Debenture the company possessed no immovable property, although it was, of course, well-known that it intended to do so and it was for that purpose that the debenture was created, but I can find nothing in the provisions of Section 7 of the Land Control Ordinance, Section 88 or Section 126 of the Crown Lands Ordinance which requires that an instrument creating a charge over future or unascertained land is affected by these sections. There would, no doubt, be considerable administrative difficulties in so construing these provisions. Under Section 7(3) of the Land Control Ordinance an agreement for sale, lease, mortgage, etc. must be reduced into writing and every such agreement shall be void for all purposes (b) if the board has not signified its

p.71, 1.35

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RECORD

consent thereto within a period of four months from the date of the agreement.

There is no such time limit in section 88(3). The instrument becomes void under that section from the date of inception. Similarly, under Section 126 of the Crown Lands Ordinance the transaction would be void in the absence of registration ab initio. It would be impossible in many instances to obtain the consent of the Land Control Board within four months from the date of the agreement because the land might not have been acquired within that period and, of course, an even greater difficulty would occur under Section 88 and Section 126. The debenture contains no reference to any land which is the subject of the two Ordinances and there would be nothing to register. It may well be that there is a lacuna in the legislation, although it has never been suggested previously, so far as I am aware that a debenture as such requires either consent or registration under the Ordinances".

p.72, 1.35

The learned Judge accordingly held that the Debenture afforded a valid defence to the Respondents' claim.

p.197, 1.19

62. Mr. Justice Crawshaw thought that the Debenture in so far as it purported to create a charge on subsequently acquired land required the consents mentioned in Section 7 and Section 88 and was required to be registered by Section 126 but having held that the Bank had a right in equity to remain in possession of the suit property pending the delivery of a memorandum of deposit, did not feel it necessary to consider whether the Debenture conferred upon the Bank a legal right to appoint a receiver or to take possession.

p.212, 11.8-29

p.216, 1.2

63. The Hon. Sir Trevor Gould thought Section 127 rendered the Debenture ineffective to create any charge on the suit property. He thought however that it followed from Denning v. Edwards (1961) A.C. 245 that anything in the Debenture which was not intended to create and did not purport to create a charge might be admitted in evidence but held that since the only power conferred by the Debenture of appointing a receiver was to appoint

p.218, 1.19

p.218, 1.43

a receiver of the land thereby charged and so far as the Court was concerned the suit property had not been charged, the Debenture was not capable of justifying the appointment of the Receiver.

10 64. Mr. Justice Newbold said that the Bank's defence to the plaint rested upon the entry of the receiver being lawful which in turn rested on the Debenture being admissible in evidence. He held that the Debenture created a charge on land and the appointment of the receiver was inextricably linked with that charge as it was a means of enforcing it and that since the Debenture had not been registered as required by Section 126 it was under Section 127 not receivable in evidence. On this aspect of the case he said:

p.229, 1.30

20 "There is nothing in Section 129 of that Ordinance which would result in Section 127 not applying to this debenture, nor is Denning v. Edwards (1960) E.A. 755 of assistance to the Bank as this is not a case where the sole object of using the debenture had nothing to do with the charge - indeed it is the very reverse".

p.229, 1.44

1961, A.C. 245

30 65. For the reasons set out above, the Hon. Sir Trevor Gould and Mr. Justice Newbold would have been in favour of allowing the appeal of the Respondents on the claim and dismissing that of the Bank on the counterclaim. However, Mr. Justice Newbold thought that the Respondents were estopped from succeeding entirely upon their appeal by reason of the decision of the Court of first instance in favour of the First Defendant, the Receiver, against which it had not appealed. It was for this reason that the order made by the Court of Appeal took the more limited form which it did and was not an order in the terms sought in the Respondents' notice of cross-appeal.

p.230, 1.3

p.232

p.89

40 66. Mr. Justice Crawshaw would have dismissed the Respondents' appeal with costs and would have allowed the Bank's appeal to the extent of substituting for the order dismissing the counterclaim with costs, a declaration that the Bank was entitled to receive a memorandum of

p.212, 11.30-45

RECORD

deposit of the title deeds to the suit property sufficient for registration and to satisfy the proviso to Section 127 of the Crown Lands Ordinance and an order that the Official Receiver as Liquidator of the Respondent Company forthwith prepared and executed and delivered to the Bank such a memorandum at the expense of the Respondent Company. He would also have awarded the Bank the costs of the appeal and of the hearing in the Court below.

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67. It is submitted that this appeal should be allowed for the following (among other)

R E A S O N S

(1) BECAUSE the Court of Appeal had no jurisdiction to entertain or alternatively should not have entertained the Respondents' appeal against the dismissal of its claim by the learned trial Judge.

(2) BECAUSE no consent to the legal Mortgage was required under Section 7 (1) of the Land Control Ordinance or under S.88(1) of the Crown Lands Ordinance.

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(3) BECAUSE the Bank was not debarred from holding land in the Highlands by section 328 of the Companies Ordinance in its unamended form.

(4) BECAUSE even if it was so debarred the Bank is by virtue of the amendment to such section effected by the Bank's Titles to Land (Amendment of laws) Ordinance 1958 able to establish for the purposes of its counterclaim that it is entitled to hold land in the Highlands.

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(5) BECAUSE the Bank is the legal mortgagee of the suit property.

(6) BECAUSE the Debenture created a charge on the suit property so soon as such land was acquired by the Respondent Company and such charge required no consent under Section 7 (1) of the Land Control Ordinance or under Section 88(1) of the Crown Lands Ordinance and was not required

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to be registered under Section 126 of such last mentioned Ordinance.

- 10 (7) BECAUSE the Debenture contains an enforceable agreement on the part of the Respondent Company to deposit the title deeds of the suit property with the Bank by way of equitable mortgage and to deliver to the Bank the memorandum of such deposit which is required to be registered by the proviso to Section 127 of the Crown Lands Ordinance.
- (8) BECAUSE the Respondent Company did deposit the said title deeds and it is to be inferred from the agreement mentioned in Reason (7) that such deposit was in pursuance of the obligation thereby imposed and was accordingly a deposit by way of equitable mortgage.
- 20 (9) BECAUSE even if the deposit of the said title deeds with the Bank was not made by way of equitable mortgage the Respondent Company are bound by the said agreement to deliver a memorandum of deposit thereof by way of equitable mortgage and on the delivery of such memorandum the Bank will become the equitable mortgagee of the suit property.
- 30 (10) BECAUSE pending the delivery of such a memorandum as is mentioned in Reason (9) the Bank should not be required to deliver up possession of the suit property.
- (11) BECAUSE the Debenture confers upon the Bank a contractual right to possession of the suit property.
- (12) BECAUSE the reasons for the dissenting judgment of Mr. Justice Crawshaw were right and those for the judgments of the Hon. Sir Trevor Gould and Mr. Justice Newbold were wrong.
- 40 (13) BECAUSE the order of the Court of Appeal was wrong and ought to be reversed.

JOHN DONALDSON

OLIVER SMITH

No. 13 of 1964

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL
FOR EASTERN AFRICA AT
NAIROBI

B E T W E E N :-

NATIONAL & GRINDLAYS
BANK LIMITED
(2nd Defendant)

... ... Appellant

- and -

KENTILES LIMITED (in
liquidation) and
THE OFFICIAL
RECEIVER (as
Liquidator thereof)
(Plaintiffs)

... ... Respondents

CASE FOR THE APPELLANT

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